IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.642 OF 2005.

Nandlal Lekhraj Thakur.
Hindu Adult, doing business
in the name of Adarsha Malai
IOce Cream Factory at 10-BA,
New Birgaunkar Wadi, Sitaladevi
Temple Road, Mahim, Mumbai 400 016. ... Appellant.

Versus.

1. Municipal Corporation of
   Greater Mumbai, having its
   Administrative Office at
   Mahapalika Nagar, Bombay 400001.
2. Max Travasso.
3. Peter Travazzo
   Girgaunkar Wadi, Sitaladevi
   Temple Road, Mahim, Mumbai 400 016. ... Respondents.

Shri V.R.Tripathi for the Appellant.

Shri J.J.Xavier for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 17th January, 2007.

ORAL JUDGMENT.:

1. The order dated 13th March 2006 directs that this Appeal shall be disposed of finally at admission stage. The record shows that the 2nd and 3rd Respondents are duly served with the notice and they are represented by an Advocate. The appearance of the Advocate is shown on the cause list. However, none appears for them.

2. The Appellant is the original Plaintiff who filed a suit for challenging the notices dated 10th August 1992 and 6th December 1993 issued by the 1st Respondent under section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as the said Act of 1888). The challenge is also to the order dated 1st September 1993 which appears to have been passed on the basis of the Notice dated 10th August 1992. The suit filed by the Appellant has been dismissed by the trial Court.

3. The learned Advocate for the Appellant submitted that the notice dated 10th August 1992 relates to a larger structure and the subsequent notice dated 6th December 1993 relates to a smaller structure. He submitted that there is no explanation as to why two notices have been issued. He submitted that in so far as the second notice is concerned, no order has been passed on the basis of the said notice. He placed reliance on the city survey plan which shows existence of the suit structure prior to the datum line. He submitted that the written statement was not filed by the 1st Respondent and therefore, the trial court ought to have passed a decree.

3. Shri Zavier appearing for the Corporation

submitted that after the first notice dated 10th August 1992 was issued, the structure was demolished on the basis of the order dated 1st September 1993. He submitted that as a new structure was unauthorisedly erected, subsequent notice was issued. He submitted that the evidence to that effect has been led.

4. I have considered the submissions. I have perused the notes of evidence. There is no written statement filed by the 1st Respondent. Therefore, the case now sought to be made out before this Court was not made out before the trial Court. A perusal of the evidence of one Shri Vishwanath Dhondiram Salve, Sub-Engineer of the 1st Respondent examined on behalf of the 1st Respondent-Corporation discloses that a bald statement was made that the suit structure was demolished on 13th September 1993. However, no document has been produced in support of the said case. nothing is placed on record to show that any order was passed on the basis of the second notice. Faced with this difficulty, Shri Zavier appearing on behalf of the 1st Respondent states that an opportunity may be given to the 1st Respondent to contest the suit by filing written statement and by leading further evidence.

5. In view of this submission, the Appeal is disposed of by the following order:

i) The impugned Judgment and order dated 21st June 2003 is quashed and set aside. L.C.Suit No.5277 of 1993 is restored.

ii) The parties are directed to appear before the learned Principal Judge of the City Civil Court, Mumbai, on 12th February 2007. The learned Principal Judge may hear the suit himself or may assign it to any other learned Judge.

iii) The 1st Respondent will file written statement on or before 15th march 2007. Under no circumstances, the time to file written statement will be extended.

iv) The learned trial Judge will decide the suit afresh after giving opportunity to all the parties to the suit to lead further evidence.

v) While deciding the suit afresh, the learned trial Judge will consider the evidence already led before remand and further evidence led by the parties after the remand.

vi) The learned trial Judge will dispose of the

suit as expeditiously as possible and preferably on or before 31st December 2007. Till final disposal of the suit and for a period of 15 days thereafter, the Appellant and the 1st Respondent will maintain statusquo in all respects in respect of the suit structure.

vii) All contentions of the parties are kept open.

viii) The Appeal is partly allowed in the above terms with no order as to costs.

ix) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.